41393-1

NO. ~~41939-1-II~~

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JOSHUA RAY PHILLIPS,

Appellant.

BRIEF OF APPELLANT

John A. Hays, No. 16654
Attorney for Appellant

1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084

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Assignment of Error

1. The defendant's conviction should be reversed and the case remanded for a new trial because the record below fails to show that the defendant knowingly and voluntarily waived his right under Washington Constitution, Article 4, § 5, to have his case tried before an elected superior court judge

2. The defendant's conviction should be reversed and the case remanded for a new trial because the trial court violated the defendant's right under Washington Constitution, Article 1, § 22, to be present at every critical stage of his trial.

Issues Pertaining to Assignment of Error

1. Should a defendant's conviction be reversed and the case remanded for a new trial if the case was tried before a Judge Pro Tem and the record below fails to show that the defendant knowingly and voluntarily waived his right under Washington Constitution, Article 4, § 5, to have his case tried before an elected superior court judge?

2. Should a defendant's conviction be reversed and the case remanded for a new trial if the trial court violated the defendant's right under Washington Constitution, Article 1, § 22, to be present at every critical stage of his trial?

STATEMENT OF THE CASE

Factual History

At about 12:15 p.m. on October 28, 2008, Ann Jacobs was walking down an alley toward Longview Pawn Brokers at the corner of Commerce and Hudson in Longview where Ms Jacobs worked. RP 335-338. As she did, a male in a "hoodie type" sweatshirt wearing a blueish baseball cap came up from behind, hit her on the head with a pipe of some sort, and demanded that she give him her property. RP 339-344. Although knocked to the ground, Ms Jacobs refused to comply, yelling "No!" *Id.* In response, her assailant ran off down the alley toward the back of Kessler's Bar and Guse's Coffee Shop on Commerce, at which point he left Ms Jacobs' field of vision. *Id.* Within a few minutes of the assault, Ms Jacobs summoned the police and told them what had happened. *Id.*

One of the officers who responded to Ms Jacobs' call went down to Guse's Coffee Shop and spoke with the owner. RP 648-653. She told him that a "dirty looking" man had recently walked through the shop from the back door, which was not a public entrance, and asked to use the bathroom. Ms Guse refused and the man walked out the front door. *Id.* The police officer then looked into the trash cans between the coffee shop and the adjoining bar, and found a baseball cap, a light sweatshirt, and blue jeans. RP 357-359. Although neither Ms Jacobs nor Ms Guse could identify the

defendant and the person they had seen that day, later testing showed that the defendant's DNA was on the sweatshirt the officer found in the trash can, and his DNA profile was consistent with the DNA profile for the genetic material on the hat. RP 787-791, 884, 1040-1045.

About an hour or so after the incident with Ms Jacobs, a person by the name of Terri Coxson got off the bus at St. John's hospital, some six or seven blocks from the area in which Ms Jacobs was assaulted. RP 399-407. After getting off the bus, she starting walking towards the hospital when a man came up behind her, grabbed her purse, and ran off. *Id.* One of the items in the purse was her debit card. *Id.* After the person ran off, Ms Coxson ran into the hospital and called the police. *Id.* This summons for help was logged in at 2:04 in the afternoon. RP 410. Once the officers arrived at the hospital, Ms Coxson told them what had happened. RP 400-407. The officers then looked in the area around the hospital for the assailant but were unable to find anyone. RP 410-413. As with Ms Jacobs and Ms Guse, Ms Coxson was not able to identify the defendant as the person who robbed her. RP 527-528. However, video images from the ATM machines of two different banks in downtown Longview about eight blocks from the hospital showed the defendant trying to use Ms Coxson's debit card within 30 minutes of the time Ms Coxson reported the robbery. RP 795-798.

Three days after the two robberies, a person by the of Levi Hunt

called 911 with a claim that the defendant had just called and threatened to kill him. RP 559-560. Mr. Hunt later met with the police and gave them the following story. *Id.* During October, he had been incarcerated in the Cowlitz County Jail with the defendant Joshua Phillips. RP 533-534. They had been friends in Junior High School, and had renewed their friendship when they met again in jail. *Id.* In their housing unit, they both met a person by the name of Andrew Bowman. *Id.* Mr. Bowman told them that he had previously worked at a local grocery store called Market Place Foods, that the same employee of that business took the weekly receipts to the bank on Fridays and Mondays, using the same vehicle parked in the same location, and that it would be easy to rob him of those receipts. RP 535-539.

Eventually, on Friday, October 24, 2008, Mr. Hunt's girlfriend was able to get a local bonding agent to post the defendant's bail on Mr. Hunt's guarantee that the defendant would be able to pay the bonding agent's fee once he got out of jail. RP 540-543, Mr. Hunt then got out of jail two days later on the 26th. *Id.* Once out of jail, he met and spoke with the defendant a number of times, pressuring him to get the money owed the bonding agent. RP 544-553, According to Mr. Hunt, during one of these telephone conversations, the defendant told him that he had tried to do some "licks," meaning robberies, but had not been successful in getting any money. RP 533-536. The defendant then explained that he had committed one of these

"licks" on Commerce when he hit someone over the head with a pipe, but he had to run away when people started coming into the alley. *Id.* Mr. Hunt went on to claim that the defendant told him that he did the other "lick" at the hospital. *Id.*

According to Mr. Hunt, the defendant then told him to hold off the bail bondsman a little bit longer because he was planning on doing the "Market Place lick." RP 556-557. Mr. Hunt replied by threatening to go to the police and tell them what the defendant had just said if the defendant did not come up with the money he owed. *Id.* The defendant responded by claiming that he "knew people" and that he had a .40 caliber Glock pistol. *Id.* Mr. Hunt went on to state that the next day, just before Mr. Hunt called 911, the defendant called and told Mr. Hunt that he was going to kill him and that he had people coming after him. RP 559-560.

Based upon the information Mr. Hunt provided, on November 2, 2008, a number of police officers went to Market Place Foods to prevent the robbery Mr. Hunt claimed the defendant said he was going to commit. RP 791-795, While they were in place, another police officer saw the defendant near the house where he was staying and arrested him. *Id.* In subsequent conversations with the police, the defendant denied committing either the robbery or the attempted robbery, and denied that he had ever intended to rob Market Place Foods. RP 846-857, After interrogating the defendant, the

officers booked him into the Cowlitz County Jail, where he remained. RP 1,164-1,165. The state charged him with the attempted robbery of Ann Jacobs, the robbery of Terri Coxson, the theft of Terri Coxson's debit card, and possession of under 40 grams of marijuana the police found on the defendant's person when they arrested him. CP 106-108.

About two months after the state charged the defendant, Kelso Police Sergeant Dar Kirk went to the Cowlitz County Jail to interview an inmate by the name of Glen Keith Jordan. RP 657-665, Mr Jordan had previously contacted the Kelso Police Department claiming he had information about a homicide. *Id.* Once Officer Kirk went to the jail, Mr. Jordan stated that he was a prior gang member. RP 676-678, 679-683. He went on to state that the defendant had recently approached him in jail and asked him to arrange for the murder of Levi Hunt. *Id.* Based upon this conversation, the police were able to obtain judicial authorization for a body wire, which they had Mr. Jordan wear while conversing with the defendant in the jail. RP 694-697. During that recorded conversation, the defendant gave Mr. Jordan information about where Mr. Hunt lived. RP 708-724 Based upon this body wire and Mr. Jordan's statements, the state amended the information to add a charge of solicitation to commit first degree murder. RP 1-3

Procedural History

By information filed November 6, 2008, the Cowlitz County

Prosecutor charged the defendant Joshua Ray Phillips with one count each of attempted first degree robbery, second degree robbery, second degree theft, and possession of under 40 grams of marijuana. CP 106-108. The state later amended that information to add a charge of solicitation to commit first degree murder. CP 1-3. In this amendment, the state alleged that the defendant committed this further offense after the filing of the original information. CP 1-3. Prior to trial, the defendant pled guilty to the marijuana charge. CP 10-17.

The case later came on for jury trial on March 1, 2010. RP 1-127. During pretrial motions on the first day of trial, the defense moved to exclude evidence that the defendant had "two prior strikes" or that this was a "three strikes case." RP 249-250. The court granted the motion and instructed the state to so inform its witnesses. *Id.* In spite of this order, on the third day of trial, the state's seventh witness, by way of a non-responsive answer, testified on cross-examination that the defendant had "two prior strikes." RP 248. The defense responded to this evidence with a motion for mistrial. RP 250. The court initially denied the motion and instructed the jury to disregard the statement. RP 252. However, after further argument and reconsideration, the court reversed its decision and declared the defense motion. RP 264-269.

Following the mistrial, the defense filed two motions to suppress evidence. CP 18-25, 32-34. In the first, the defense argued that the court

should suppress the recording from a body wire an inmate at the Cowlitz County Jail wore during a conversation with the defendant. CP 18-25. Specifically, the defense argued that the police had failed to meet the requirements of RCW 9.73.030(2) in their request for authorization to record the conversation. *Id.* The state responded that the affidavit given in support of the wire request provided sufficient specificity as to why the recording was necessary and thereby met the requirements of the statute. CP 26-31. In the second motion to suppress, the defense argued that the court should suppress all evidence the police obtained when they seized and searched the defendant's cell phone without a warrant after they arrested him. CP 32-34.

The court later denied the defendant's first motion to suppress, finding that the police affidavit given in support of the request to record under RCW 9.73.030(2) met the requirements of the statute. RP 277-284. As of the date of this brief, the state has not presented findings and conclusions on this motion. CP 1-123. The state later informed the defense that it would not oppose the defendant's second motion, and by the time of the second trial, the state stipulated that it would not seek to admit or use the information the officers obtained when they searched the defendant's cell phone. RP 309-312. However, the state did not concede any impropriety in the police reading an address book they found in the defendant's possession at the time of his arrest and the court denied the defendant's motion to

suppress this evidence. CP 442-453, 610-615.

On August 16, 2010, Superior Court Judge Johanson signed an order appointing Lisa Tabbut, a member of the bar, as a Judge *Pro Tempore* to preside over this case. CP 115. On that same day, Ms Tabbut signed an oath of office, and the two opposing attorneys signed an agreement to allow Ms Tabbut to hear the case. CP 113-114. However, the defendant did not sign this agreement. *Id.* Neither did the court enter into a colloquy with the defendant to determine whether or not he even understood that he had a constitutional right to have an elected judge hear his case or that a member of the bar could not sit as a judge *pro tempore* in his case without his specific consent. CP 113-114; RP 288-289. In addition, the sole statement on the record concerning the defendant's waiver of his rights under Washington Constitution, Article 4, § 5, came just prior to *voir dire* during the following colloquy.

> MR. SMITH: No, Your Honor. The State is ready for trial. The State has signed the order agreeing to the appointment of Your Honor to hear this case. I think that was the only issue we needed to address before the jury came in.
>
> JUDGE TABBUT: Mr. Blair, are you ready to proceed?
>
> MR. BLAIR: We are.
>
> JUDGE TABBUT: I guess there is the one issue that I wanted to put on the record. I am sitting here today as a judge pro tem. Both attorneys have signed off on that. I understand that Mr. Blair has talked to Mr. Phillips and gotten Mr. Phillips' agreement. I made it

known to the parties that I have previously represented Mr. Phillips as a defense attorney when I was practicing out in juvenile and I think I have a recollection of handling a case, at least in part, through – representing Mr. Phillips as an adult. But, as I recall, I withdrew from my representation. So, I don't certainly have any problems hearing this case. I don't feel there are any issues that would, based upon my prior representation, that bears on anything that would or could happen. So, with that, anything else we need to take up? If not, I will step out for just a moment while the jury comes in. We are going to seat 24? We are going to seat 24 and then, arrange the folks in the back. Okay?

MR. BLAIR: Thank you.

JUDGE TABBUT: You're welcome.

RP 288-289.

Following this colloquy, the case proceeded with *voir dire* and opening statements. RP 289. The prosecution then presented its case-in-chief, calling 17 witnesses who testified to the facts set out in the preceding factual history. RP 335-1054; *see also Factual History*. The defense then called three witnesses, and the state recalled one witness in rebuttal. RP 1057-1150, 1164. After the close of testimony, the parties met in chambers for an unrecorded conference to discuss the proposed jury instructions. RP 1173. The court then reconvened the case on the record in the courtroom. RP 1173-1183. Once back in the courtroom and on the record, the defense put objections to the proposed instructions on the record, objected to the court's refusal to use a lesser included instruction, objected to the court's refusal to give a missing witness instruction, and objected to the court's

decision to allow the state to present certain evidence to the jury during closing arguments. *Id.* During this portion of the trial, the defendant, who was in custody, was not in the courtroom. RP 1183. Eventually, Cowlitz County Jail personnel brought the defendant back into the courtroom and the judge noted that fact. *Id.*

After the defendant was returned to the courtroom, the jury was brought back in and the court read the instructions to them. RP 1188-1205. The jury then listened to closing argument and retired for deliberation. RP 1206-1281. The jury eventually returned with verdicts of "guilty" to the charges of solicitation to commit first degree murder, second degree robbery, and second degree theft, and a verdict of "not guilty" to the charge of attempted first degree robbery. CP 74-77; RP 1293-1294. Two weeks later, the court sentenced the defendant to life in prison on the solicitation and robbery convictions, having found two prior strike offenses in the defendant's criminal history. RP 1320-1356; CP 82-97. The defendant thereafter filed timely notice of appeal. CP 101.

ARGUMENT

I. THE DEFENDANT'S CONVICTION SHOULD BE REVERSED AND THE CASE REMANDED FOR A NEW TRIAL BECAUSE THE RECORD BELOW FAILS TO SHOW THAT THE DEFENDANT KNOWINGLY AND VOLUNTARILY WAIVED HIS RIGHT UNDER WASHINGTON CONSTITUTION, ARTICLE 4, § 5 TO HAVE HIS CASE TRIED BEFORE AN ELECTED SUPERIOR COURT JUDGE.

Under Washington Constitution, Article 4, § 5, every person charged with a felony, and every civil litigant appearing in a superior court has the right to have an elected superior court judge preside over his or her trial. *State v. Sain*, 34 Wn.App. 553, 663 P.2d 493 (1983). This constitutional provision states as follows:

> There shall be in each of the organized counties of this state a superior court for which at least one judge shall be elected by the qualified electors of the county at the general state election . . . . If a vacancy occurs in the office of judge of the superior court, the governor shall appoint a person to hold the office until the election and qualification of a judge to fill the vacancy, which election shall be at the next succeeding general election, and the judge so elected shall hold office for the remainder of the unexpired term.

Washington Constitution, Article 4, § 5 (in part).

While the litigants in a felony criminal proceeding each have the right to have the case tried by an elected superior court judge, our constitution and statutory law do allow judges *pro tempore* to preside over individual cases if both parties consent. Washington Constitution, Article 4, § 7; RCW 2.08.180. Washington Constitution, Article 4, § 7, states as follows

concerning the appointment of judges *pro tempore*:

> The judge of any superior court may hold a superior court in any county at the request of the judge of the superior court thereof, and upon the request of the governor it shall be his or her duty to do so. A case in the superior court may be tried by a judge pro tempore either with the agreement of the parties if the judge pro tempore is a member of the bar, is agreed upon in writing by the parties litigant or their attorneys of record, and is approved by the court and sworn to try the case; or without the agreement of the parties if the judge pro tempore is a sitting elected judge and is acting as a judge pro tempore pursuant to supreme court rule. The supreme court rule must require assignments of judges pro tempore based on the judges' experience and must provide for the right, exercisable once during a case, to a change of judge pro tempore. Such right shall be in addition to any other right provided by law. However, if a previously elected judge of the superior court retires leaving a pending case in which the judge has made discretionary rulings, the judge is entitled to hear the pending case as a judge pro tempore without any written agreement.

Washington Constitution, Article 4, § 7.

This constitutional provision authorizes four types of judges *pro tempore*: (1) out-of-county superior court judges hearing a case at the request of either an in-county superior court judge or the governor, (2) members of the bar if agreed upon by the parties, (3) an elected judge of that county appointed pursuant to supreme court rule, and (4) a retired superior court judge who had previously made a discretionary decision in the case prior to retirement. The case at bar deals with the second alternative only, since the judge *pro tempore* hearing the case had not then nor previously been elected as either a superior court judge or a judge of a court of limited jurisdiction. Rather, she was a member of the bar. The appointment of members of the

bar to sit as judges *pro tempore*, found in Washington Constitution, Article 4, § 7, is also found in RCW 2.08.180, the first portion of which provides as follows:

> A case in the superior court of any county may be tried by a judge pro tempore, who must be either: (1) A member of the bar, agreed upon in writing by the parties litigant, or their attorneys of record, approved by the court, and sworn to try the case; or (2) pursuant to supreme court rule, any sitting elected judge.

RCW 2.08.180 (in part).

In *National Bank of Washington, Coffman-Dobson Branch v. McCrillis*, 15 Wn.2d 345, 130 P.2d 901 (1942), the Washington Supreme Court explained that under both the constitution and the statute, the authority of a member of the bar to preside over a case in the superior court derives solely from the consent of the litigants. The court notes as follows on this point:

> A judge *pro tem.*, under our statute, is appointed to hear one particular case. He does not derive his authority from a general election, nor from an appointment by an executive officer, but his power to act is based upon the consent of the parties litigant to his appointment. A judge *pro tem.*, under our statute, is not a superior court judge, and could make no claim to the office of superior court judge. We are of the opinion that it clearly appears from the constitutional and statutory provisions that the essential element to the valid appointment of a judge *pro tem.* which must exist is the consent of the parties.

McCrillis, 15 wn.2d at 357.

In *McCrillis*, the court went on to note that the parties may consent to

the appointment of a judge *pro tempore* either orally in open court or by written stipulation. *McCrillis*, 15 Wn.2d at 356. However, without the consent of both parties, the judge *pro tempore* lacks jurisdiction. *McCrillis*, 15 Wn.2d at 359.

The language in both Washington Constitution, Article 4, § 7 and RCW 2.08.180 makes it appear that consent for the appointment of a judge *pro tempore* can be given solely by the attorneys of record, regardless of the desires of the litigants. However, as the decision in *State v. Sain*, *supra*, explains, the right to have an elected superior court judge preside over a felony trial is a substantial constitutional right that can only be waived by the defendant, not by his or her attorney. The following examines this case.

In *State v. Sain, supra*, the state charged three defendant's with first degree robbery. The court appointed a single attorney to represent all three. When the elected superior court judge became ill, the defendants' attorney twice orally consented to the appointment of a judge *pro tempore* to hear the case. That judge *pro tempore* presided over the remainder of the proceedings. Two days before trial, the court allowed the defense attorney to withdraw from representing two of the three defendants based upon a conflict of interest. The court then appointed a new attorney for the two defendants the original attorney could no longer represent.

The next day, the new attorney appeared before the court and moved

to continue the case. The court denied the motion, but only after both of the attorneys signed a stipulation acknowledging their willingness to proceed before the judge, who was still presiding *pro tempore*. On the morning of trial, the court requested that the three defendants state on the record that they agreed to have their case tried before a judge *pro tempore*. The defendant represented by the original attorney refused. The other two defendants consented. However, after the court again denied a motion to continue, those two defendants stated on the record that they were withdrawing their consent to have a judge *pro tempore* preside over their cases. None the less, the case went to trial and all three defendants were convicted.

Following conviction, all three defendants appealed, arguing in part that since they had not consented to having a *pro tempore* judge preside of their cases, the judge had acted without jurisdiction. Thus, they claimed the right to a new trial. The state responded by arguing that the consent by both defense counsel, which was eventually reduced to writing and acknowledged in open court, was sufficient to satisfy the requirements of both the constitution and the statute. The Court of Appeals first reviewed the case of the defendant who was represented by the original attorney at trial and who had refused consent to a judge *pro tempore* at the beginning of the trial.
In addressing this defendant's arguments, the court first noted a distinction between "procedural issues" and "substantial rights." As the court noted, an

attorney has the authority to waive procedural issues. However, only a defendant can waive "substantial rights." The court then went on to hold that the right to be tried by an elected judge derived directly from the constitution and constituted a substantial right that only the defendant could waive. The court held as follows on this issue:

> We find the right under Const. art. 4, § 5, to be tried in a court presided over by an elected superior court judge accountable to the electorate is a substantial right. Thus, the requirement of Mr. Sain's written consent could not be waived by Mr. Burchard's unauthorized statements.

State v. Sain, 34 Wn.App. at 557.

The court then noted that the judge *pro tempore* should have obtained the defendant's written consent prior to trial and the failure to do so robbed the judge of jurisdiction and required reversal of the conviction. The court's specific holding was as follows:

> The record before us leaves substantial doubt as to what happened prior to the morning of trial. In fact, there is no record of exactly what was said during the telephonic presentations to Judge Ennis or what precisely occurred the evening before trial. One thing is clear; Larry Sain refused to give his written consent to Judge Ennis sitting as judge pro tempore at his trial. While it is understandable how these events came about, hindsight indicates the defendants' written consent should have been obtained before Judge Ennis undertook any action in the case. Consequently, we are constrained to hold the judge *pro tempore* did not have jurisdiction to preside over the trial of Larry Sain and his conviction must be reversed and remanded for retrial.

State v. Sain, 34 Wn.App. at 557.

The court's requirement that the judge *pro tempore* first obtain the defendant's written consent to preside over the case follows a line of cases which require the court to enter into a direct colloquy with any defendant who states the intent to waive a right secured under the constitution. For example, our case law requires the court to engage in a colloquy with a defendant indicating a desire to waive the right to jury trial under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment. *State v. Bugai*, 30 Wn.App. 156, 157, 632 P.2d 917 (1981) ("Because of the constitutional guarantee of trial by jury, the record must show that the waiver of a jury by the accused was knowingly, intelligently and voluntarily made.")

Similarly, the court must enter into a detailed colloquy with any defendant indicating a desire to waive the right to counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. As with jury waivers, the waiver of the right to counsel must also be knowingly, voluntarily, and intelligently made. *State v. Harell*, 80 Wn.App. 802, 805, 911 P.2d 1034 (1996). Thus, if the court fails to hold a detailed colloquy with the defendant to assure that the waiver is knowingly, voluntarily and intelligently made, the record must clearly reflect that the defendant at least understood the seriousness of the charge, the possible maximum penalty involved, and the existence of technical procedural rules

governing the presentation of a defense. *State v. DeWeese*, 117 Wn.2d 369, 377-378, 816 P.2d 1 (1991).

Our case law requires an even more detailed colloquy with a defendant indicating the desire to plead guilty. Under the due process clauses found in Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, all guilty pleas must be knowingly, voluntarily, and intelligently entered. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *In re Pers. Restraint of Stoudmire,* 145 Wn.2d 258, 36 P.3d 1005 (2001). Guilty pleas that are entered without a statement of the consequences of the sentence are not "knowingly" made. *State v. Miller*, 110 Wn.2d 528, 756 P.2d 122 (1988). While the trial court need not inform a defendant of all possible collateral consequences of his or her guilty plea, the court must inform the defendant of all direct consequences. *State v. Ross*, 129 Wn.2d 279, 916 P.2d 405 (1996).

These cases stand for the proposition that, absent a sufficient record, the courts must indulge every reasonable presumption against finding the waiver of a constitutional right. *State v. Wicke*, 91 Wn.2d 638, 645, 591 P.2d 452 (1979). For example, in *State v. Hos,* 154 Wn.App. 238, 225 P.3d 389 (2010), a defendant appealed her conviction for possession of methamphetamine following a bench trial, arguing that she had not knowingly, voluntarily, and intelligently waived her right to a jury trial. In

this case, the defendant's attorney had brought an unsuccessful suppression motion, and then stated that the defendant wished to submit to a bench trial on stipulated facts in order to reserve the right to appeal the denial of the motion to suppress. The court then accepted the defense attorney's statement and found the defendant guilty upon a stipulation to facts presented by the parties. At no point did the defendant object. However, neither did the court enter into a colloquy with the defendant concerning her right to trial by jury, and the defendant did not sign a written jury waiver.

On appeal, the state responded by arguing that (1) the defendant ratified her attorney's oral waiver of her right to jury trial by failing to object and (2) the error was not preserved for appeal because the defendant had not called the error to the trial court's attention. In addressing these arguments, the court first reviewed the decision in *State v. Wicke*, *supra*, noting as follows:

> To be sufficient, the record must contain the defendant's personal expression of waiver; counsel's waiver on the defendant's behalf is not sufficient. Our Supreme Court upheld the Court of Appeals' reversal of Wicke's conviction following a bench trial because, although Wicke's trial counsel had stated on the record that Wicke waived his right to a jury trial, the record did not contain Wicke's personal expression of such jury trial waiver. Wicke had stood beside his counsel, without objection, as counsel orally waived a jury trial. But the trial court did not question Wicke about whether he had discussed a jury waiver with defense counsel and whether he had agreed to the waiver; nor did Wicke file a written jury trial waiver under CrR 6.1(a).

State v. Hos, 154 Wn.App. at 250-251 (citations and footnote omitted).

Based upon the holding in *Wicke*, the court then went on to reject the state's arguments, in spite of the fact that the defendant had stood by counsel and failed to object when her case was tried to the bench. The court stated:

> But here, as in *Wicke*, the record does not contain Hos's personal expression waiving her right to a jury trial. Hos did not sign a written jury trial waiver. Nor did the trial court question Hos on the record to determine whether she knowingly, intelligently, and voluntarily waived her right to a jury trial, or even whether she had discussed the issue with her defense counsel or understood what rights she was waiving. Because the record lacks Hos's personal expression of waiver of her constitutional right to a jury trial, Wicke requires that we reverse her conviction and remand for a new trial.

State v. Hos, 154 Wn.App. at 251-252.

In both *Hos* and *Wicke,* the court refused to find a waiver of the right to jury trial in spite of the fact that (1) the defendants stood by their attorneys in open court and said nothing when their attorneys informed the court that each defendant was waiving the right to jury trial, and (2) each defendant continued to say nothing when their cases were tried to the bench. There is even less support in the case at bar to find an implied waiver than existed in *Hos* and *Wicke*. In this case, the sole statement on the record concerning the defendant's waiver of his rights under Washington Constitution, Article 4, § 5, came just prior to *voir dire* during the following colloquy.

> MR. SMITH: No, Your Honor. The State is ready for trial. The State has signed the order agreeing to the appointment of Your Honor to hear this case. I think that was the only issue we needed to address before the jury came in.

JUDGE TABBUT: Mr. Blair, are you ready to proceed?

MR. BLAIR: We are.

JUDGE TABBUT: I guess there is the one issue that I wanted to put on the record. I am sitting here today as a judge pro tem. Both attorneys have signed off on that. I understand that Mr. Blair has talked to Mr. Phillips and gotten Mr. Phillips' agreement. I made it known to the parties that I have previously represented Mr. Phillips as a defense attorney when I was practicing out in juvenile and I think I have a recollection of handling a case, at least in part, through – representing Mr. Phillips as an adult. But, as I recall, I withdrew from my representation. So, I don't certainly have any problems hearing this case. I don't feel there are any issues that would, based upon my prior representation, that bears on anything that would or could happen. So, with that, anything else we need to take up? If not, I will step out for just a moment while the jury comes in. We are going to seat 24? We are going to seat 24 and then, arrange the folks in the back. Okay?

MR. BLAIR: Thank you.

JUDGE TABBUT: You're welcome.

RP 288-289.

As is apparent from this colloquy, the court did not do what the court in *Sain* instructed should be done: get a written waiver from the defendant consenting to have his case tried before a judge *pro tempore*. Neither did the court engage in any type of colloquy to assure itself that the defendant understood his right to have his case tried before an elected judge and that the defendant knowingly, voluntarily, and intelligently waived that right. Thus, in the same manner that the courts in *Hos* and *Wicke* refused to find an implied waiver of the defendants' constitutional right to jury trial, so this court should

refuse to find an implied waiver of the defendant's constitutional right to have his case tried before an elected judge. Thus, in the same manner that the failure to obtain such a waiver required reversal and a new trial in *Sain* based upon the judge *pro tempore's* lack of jurisdiction, so the failure to obtain such a waiver requires reversal and a new trial in the case at bar based upon the judge *pro tempore's* lack of jurisdiction.

II. THE DEFENDANT'S CONVICTION SHOULD BE REVERSED AND THE CASE REMANDED FOR A NEW TRIAL BECAUSE THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, TO BE PRESENT AT EVERY CRITICAL STAGE OF HIS TRIAL.

Under Washington Constitution, Article 1, § 22, a defendant in a criminal case has the right to "to appear and defend in person." This constitutional guarantee is embodied in the rule that a defendant has the right to be present at "every critical stage of a criminal proceeding." *In re the Personal Restraint of Lord*, 123 Wn.2d 296, 868 P.2d 835 (1994). In *State v. Chappel*, 145 Wn.2d 210, 36 P.3d 1025 (2001), the Washington Supreme Court stated this rule as follows:

> A criminal defendant has a constitutional right to be present in the courtroom at all critical stages of the trial arising from the confrontation clause of the Sixth Amendment to the United States Constitution, applied to the states through the Fourteenth Amendment. The Washington State Constitution also provides a criminal defendant with "the right to appear and defend in person." Wash. Const. Art. I, § 22. Additionally, Washington's criminal rules state that "[t]he defendant shall be present ... at every stage of the trial ... except ... for good cause shown." CrR 3.4(a).

State v. Chapple, 145 Wn.2d at 318.

At a minimum, "critical stages" in a criminal trial include any hearing at which "evidence is being presented or whenever the defendant's presence has a relation, reasonably substantial, to the opportunity to defend against the charge." *State v. Bremer*, 98 Wn.App 832, 991 P.2d 118 (2000).

Our case law recognizes two fact patterns under which a defendant can be deemed to have waived the right to be present at a critical stage of the proceeding: (1) when the defendant voluntarily absents himself or herself from the proceeding, and (2) when the defendant acts in a contemptuous and disruptive manner. *See State v. Garza*, 110 Wn.2d 360, 77 P.3d 347 (2003), and *State v. DeWeese*, 117 Wn.2d 369, 816 P.2d 1 (1991). However under the first exception, the trial court cannot simply presume a waiver from mere absence, and under the second exception, the trial court must use the least restrictive alternative available and allow a defendant to return to the courtroom if he or she promises to behave. *Garza, supra; DeWeese, supra.* The hallmark of both these exceptions to the defendant's right to be present at any critical stage of the proceedings is that it is the defendant's own improper conduct that results in exclusion, and that the defendant always has the power to return to the proceeding upon a promise of good conduct.

Normally, conferences about the admissibility of jury instructions are not deemed a "critical stage" in the proceedings that require the defendant's

presence because they only involve the resolution of legal issues. Such discussions many times occur off the record and in chambers outside of the defendant's presence. For example, in *State v. Bremer, supra*, a defendant convicted of attempted residential burglary appealed, arguing that the court's decision to hold a discussion about jury instructions in chambers outside his presence denied him the right to be present in all critical states of the proceedings. However, noting that the discussion in chambers dealt solely with the legal issues surrounding the use of certain jury instructions, the court found no constitutional violation. The court states as follows on this issue:

> The crux of a defendant's constitutional right to be present at all critical stages of the proceedings is the right to be present when evidence is being presented or whenever the defendant's presence has "a relation, reasonably substantial," to the opportunity to defend against the charge. A defendant does not have a right to be present during in-chambers or bench conferences between the court and counsel on legal matters, at least when those matters do not require the resolution of disputed facts.
>
> Mr. Bremer contends that he was not allowed to be present when the court, the State and his attorney discussed proposed jury instructions. This was not a hearing at which evidence was being presented. Jury instructions involve resolution of legal issues, not factual issues. In the absence of some extraordinary circumstance in which Mr. Bremer's presence would have made a difference, a discussion involving proposed jury instructions is not a critical stage of the proceedings. Because Mr. Bremer was fully represented by counsel at the hearing, he would not have had an opportunity to speak. As such, Mr. Bremer's presence had no relation to the opportunity to defend against the charge of attempted residential burglary. Pursuant to the holding in Lord, Mr. Bremer's absence from the jury instruction hearing was not a violation of his constitutional rights.

State v. Bremer, 98 Wn.App. at 834-35.

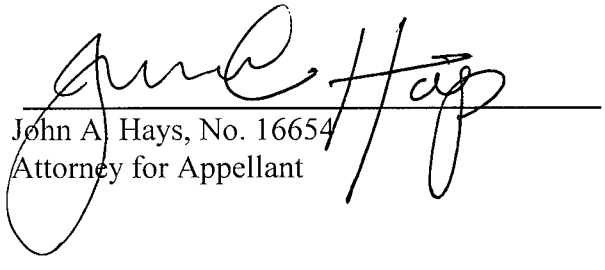
The facts from *Bremer* stand in contrast to the facts in this case at bar. In the instant case, the parties held an in chambers discussion concerning the admissibility of certain jury instructions. The defendant does not assign error to this action. However, the parties then returned to the courtroom, went back on the record, and then discussed the admissibility of certain instructions, along with the admissibility of certain evidence and the prosecutor's use of evidence in front of the jury during closing argument. This discussion spanned 10 transcribed pages and went well beyond a simple discussion about the admissibility of jury instructions. Since this in court session did include discussions about the admissibility of evidence, particularly the evidence the jury would hear and see, it did constitute a "critical state" in the proceedings, and the exclusion of the defendant from that portion of the trial denied the defendant his rights under Washington Constitution, Article 1, § 22. As a result, this court should reverse the defendant's convictions and remand for a new trial.

CONCLUSION

Since the trial record fails to show that the defendant knowingly, voluntarily, and intelligently waived his right under Washington Constitution, Article 4, § 5, to have his case tried before an elected judge, the judge *pro tempore* did not have jurisdiction to hear the case. As a result, the defendant is entitled to a new trial. In addition, the exclusion of the defendant from a critical stage in the proceedings denied the defendant his rights under Washington Constitution, Article 1, § 22, and entitles him to a new trial.

DATED this 10th day of August, 2011.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

Washington Constitution, Article 4, § 5
Superior Court – Election of Judges, Terms of, Etc.

There shall be in each of the organized counties of this state a superior court for which at least one judge shall be elected by the qualified electors of the county at the general state election: Provided, That until otherwise directed by the legislature one judge only shall be elected for the counties of Spokane and Stevens; one judge for the county of Whitman; one judge for the counties of Lincoln, Okanogan, Douglas and Adams; one judge for the counties of Walla Walla and Franklin; one judge for the counties of Columbia, Garfield and Asotin; one judge for the counties of Kittitas, Yakima and Klickitat; one judge for the counties of Clarke, Skamania, Pacific, Cowlitz and Wahkiakum; one judge for the counties of Thurston, Chehalis, Mason and Lewis; one judge for the county of Pierce; one judge for the county of King; one judge for the counties of Jefferson, Island, Kitsap, San Juan and Clallam; and one judge for the counties of Whatcom, Skagit and Snohomish. In any county where there shall be more than one superior judge, there may be as many sessions of the superior court at the same time as there are judges thereof, and whenever the governor shall direct a superior judge to hold court in any county other than that for which he has been elected, there may be as many sessions of the superior court in said county at the same time as there are judges therein or assigned to duty therein by the governor, and the business of the court shall be so distributed and assigned by law or in the absence of legislation therefor, by such rules and orders of court as shall best promote and secure the convenient and expeditious transaction thereof. The judgments, decrees, orders and proceedings of any session of the superior court held by any one or more of the judges of such court shall be equally effectual as if all the judges of said court presided at such session. The first superior judges elected under this Constitution shall hold their offices for the period of three years, and until their successors shall be elected and qualified, and thereafter the term of office of all superior judges in this state shall be for four years from the second Monday in January next succeeding their election and until their successors are elected and qualified. The first election of judges of the superior court shall be at the election held for the adoption of this Constitution. If a vacancy occurs in the office of judge of the superior court, the governor shall appoint a person to hold the office until the election and qualification of a judge to fill the vacancy, which election shall be at the next succeeding general election, and the judge so elected shall hold office for the remainder of the unexpired term.

Washington Constitution, Article 4, § 7
Exchange of Judges – Judge Pro Tempore

The judge of any superior court may hold a superior court in any county at the request of the judge of the superior court thereof, and upon the request of the governor it shall be his or her duty to do so. A case in the superior court may be tried by a judge pro tempore either with the agreement of the parties if the judge pro tempore is a member of the bar, is agreed upon in writing by the parties litigant or their attorneys of record, and is approved by the court and sworn to try the case; or without the agreement of the parties if the judge pro tempore is a sitting elected judge and is acting as a judge pro tempore pursuant to supreme court rule. The supreme court rule must require assignments of judges pro tempore based on the judges' experience and must provide for the right, exercisable once during a case, to a change of judge pro tempore. Such right shall be in addition to any other right provided by law. However, if a previously elected judge of the superior court retires leaving a pending case in which the judge has made discretionary rulings, the judge is entitled to hear the pending case as a judge pro tempore without any written agreement.

RCW 2.08.180
Judge pro tempore – Appointment – Oath – Compensation

A case in the superior court of any county may be tried by a judge pro tempore, who must be either: (1) A member of the bar, agreed upon in writing by the parties litigant, or their attorneys of record, approved by the court, and sworn to try the case; or (2) pursuant to supreme court rule, any sitting elected judge. Any action in the trial of such cause shall have the same effect as if it was made by a judge of such court. However, if a previously elected judge of the superior court retires leaving a pending case in which the judge has made discretionary rulings, the judge is entitled to hear the pending case as a judge pro tempore without any written agreement.

A judge pro tempore shall, before entering upon his or her duties in any cause, take and subscribe the following oath or affirmation:

> "I do solemnly swear (or affirm, as the case may be,) that I will support the Constitution of the United States and the Constitution of the State of Washington, and that I will faithfully discharge the duties of the office of judge pro tempore in the cause wherein ..... is plaintiff and ..... defendant, according to the best of my ability."

A judge pro tempore who is a practicing attorney and who is not a retired justice of the supreme court or judge of a superior court of the state of Washington, or who is not an active judge of a court of the state of Washington, shall receive a compensation of one-two hundred fiftieth of the annual salary of a superior court judge for each day engaged in said trial, to be paid in the same manner as the salary of the superior judge. A judge who is an active full-time judge of a court of the state of Washington shall receive no compensation as judge pro tempore. A judge who is an active part-time judge of a court of the state of Washington may receive compensation as a judge pro tempore only when sitting as a judge pro tempore during time for which he or she is not compensated as a part-time judge. A justice or judge who has retired from the supreme court, court of appeals, or superior court of the state of Washington shall receive compensation as judge pro tempore in the amount of sixty percent of the amount payable to a judge pro tempore under this section, provided that a retired justice or judge may decline to accept compensation.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, **Respondent**	**NO. 08-1-01255-4** **COURT OF APPEALS NO: 41393-1-II**
vs.	
JOSHUA R. PHILLIPS, **Appellant**	**AFFIRMATION OF SERVICE**

STATE OF WASHINGTON)
) : ss.
County of Cowlitz)

CATHY RUSSELL, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On August 10, 2011, I personally placed in the mail the following documents

1. BRIEF OF APPELLANT
2. AFFIRMATION OF SERVICE

to the following:

SUE BAUR
COWLITZ COUNTY PROS ATTY
312 S.W. FIRST AVE.
KELSO, WA 98626

JOSHUA R. PHILLIPS #874060
WA STATE PENITENTIARY
1313 13TH AVE.
WALLA WALLA, WA 99362

Dated this 10TH day of AUGUST, 2011 at LONGVIEW, Washington.

Cathy Russell

CATHY RUSSELL
LEGAL ASSISTANT TO JOHN A. HAYS

John A. Hays
Attorney at Law
1402 Broadway
Longview, WA 98632
(360) 423-3084